

COMMISSION DECISION

of 24 August 2012

on amending Annex I to Regulation (EC) No 715/2009 of the European Parliament and of the Council on conditions for access to the natural gas transmission networks

(Text with EEA relevance)

(2012/490/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 ⁽¹⁾, and in particular Article 23(2) thereof,

Whereas:

- (1) Regulation (EC) No 715/2009 sets non-discriminatory rules for access conditions to natural gas transmission systems to ensure the proper functioning of the internal market in gas. Since the duplication of gas transmission systems is in most cases not economic and efficient, competition in natural gas markets is stimulated by third-party access opening infrastructure to all suppliers in a transparent and non-discriminatory way. The frequent occurrence of contractual congestion where network users cannot gain access to gas transmission systems in spite of the physical availability of the capacity is an obstacle on the road towards completing the internal energy market.
- (2) The practice has shown that despite the application of certain congestion-management principles such as the offering of interruptible capacities as provided for by Regulation (EC) No 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks ⁽²⁾ and Regulation (EC) No 715/2009, contractual congestion in the Union gas transmission networks remains an obstacle to the development of a well-functioning internal market in gas. Therefore it is necessary to amend the guidelines on the application of congestion-management procedures in the event of contractual congestion. In accordance with Article 23(3) of Regulation (EC) No 715/2009 the proposed guidelines should reflect differences between national gas systems and may set minimum requirements to be met to achieve non-discriminatory and transparent network access conditions with respect to congestion management procedures.
- (3) The congestion-management procedures should apply in the event of contractual congestion and are aimed at

resolving those events by bringing unused capacity back to the market to be reallocated in the course of the regular allocation processes.

- (4) Where an interconnection point is frequently subject to the occurrence of physical congestion, congestion management procedures may often be of no avail. In those cases a solution should be examined from a network planning and investment point of view.
- (5) In accordance with Regulation (EC) No 713/2009 of the European Parliament and of the Council ⁽³⁾ the Agency for the Cooperation of Energy Regulators ('the Agency') should monitor and analyse the implementation of these guidelines. It is necessary that transmission system operators publish the information necessary to identify the occurrence of contractual congestion in a workable format.
- (6) In accordance with Article 24 of Regulation (EC) No 715/2009 the national regulatory authorities ensure compliance with those guidelines.
- (7) In order to ensure that congestion management procedures are applied in the most effective way at all interconnection points and with a view to maximising available capacities in all adjacent entry-exit systems, it is of great importance that national regulatory authorities and transmission system operators from different Member States and within Member States closely cooperate amongst themselves and with each other. In particular national regulatory authorities and transmission system operators should have regard to best practices and endeavour to harmonise processes for the implementation of these Guidelines. Acting in accordance with Article 7 of Regulation (EC) No 713/2009 the Agency and the national regulatory authorities should ensure that the most effective congestion management procedures are implemented at the applicable entry and exit points across the Union.
- (8) Whereas transmission system operators possess detailed information about the physical use of the system and are best placed to assess future flows, it is appropriate for them to determine an amount of additional capacity to be made available in addition to the calculated technical capacity. By offering more firm capacity than technically available through taking into consideration flow scenarios and contracted capacities, transmission system

⁽¹⁾ OJ L 211, 14.8.2009, p. 36.

⁽²⁾ OJ L 289, 3.11.2005, p. 1.

⁽³⁾ OJ L 211, 14.8.2009, p. 1.

operators take a risk that should be rewarded accordingly. For the purpose of determining transmission system operators' revenues, such additional capacity should however only be allocated if all other capacity, including capacity resulting from the application of other congestion-management procedures, has been allocated. Transmission system operators should closely cooperate to set the technical capacity. In order to resolve a potential situation of physical congestion the transmission system operators should apply the most cost-effective measure, including either buying back capacity or taking other technical or commercial measures.

- (9) Regulation (EC) No 715/2009 should therefore be amended accordingly.
- (10) The measures provided for in this Decision are in accordance with the opinion of the Committee established by Article 51 of Directive 2009/73/EC of the European Parliament and of the Council ⁽¹⁾,

HAS ADOPTED THIS DECISION:

Article 1

Annex I to Regulation (EC) No 715/2009 is amended in accordance with the Annex to this Decision.

Article 2

This Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels, 24 August 2012.

For the Commission

The President

José Manuel BARROSO

⁽¹⁾ OJ L 211, 14.8.2009, p. 94.

ANNEX

Annex I to Regulation (EC) No 715/2009 is amended as follows:

1. point 2.2 is replaced by the following:

2.2. Congestion management procedures in the event of contractual congestion

2.2.1. General Provisions

1. The provisions of point 2.2 shall apply to interconnection points between adjacent entry-exit systems, irrespective of whether they are physical or virtual, between two or more Member States or within the same Member State in so far as the points are subject to booking procedures by users. They may also apply to entry points from and exit points to third countries, subject to the decision of the relevant national regulatory authority. Exit points to end-consumers and distribution networks, entry points from LNG terminals and production facilities, and entry-exit points from and to storage facilities are not subject to the provisions of point 2.2.
2. On the basis of the information published by the transmission system operators pursuant to Section 3 of this Annex and, where appropriate, validated by national regulatory authorities, the Agency shall publish by 1 March of every year, commencing with the year 2014, a monitoring report on congestion at interconnection points with respect to firm capacity products sold in the preceding year, taking into consideration to the extent possible capacity trading on the secondary market and the use of interruptible capacity.
3. Any additional capacity made available through the application of one of the congestion-management procedures as provided for in points 2.2.2, 2.2.3, 2.2.4 and 2.2.5 shall be offered by the respective transmission system operator(s) in the regular allocation process.
4. The measures provided for in points 2.2.2, 2.2.4 and 2.2.5 shall be implemented as of 1 October 2013. Points 2.2.3(1) to 2.2.3(5) shall apply as of 1 July 2016.

2.2.2. Capacity increase through oversubscription and buy-back scheme

1. Transmission system operators shall propose and, after approval by the national regulatory authority, implement an incentive-based oversubscription and buy-back scheme in order to offer additional capacity on a firm basis. Before implementation, the national regulatory authority shall consult with the national regulatory authorities of adjacent Member States and take account of the adjacent national regulatory authorities' opinions. Additional capacity is defined as the firm capacity offered in addition to the technical capacity of an interconnection point calculated on the basis of Article 16(1) of this Regulation.
2. The oversubscription and buy-back scheme shall provide transmission system operators with an incentive to make available additional capacity, taking account of the technical conditions, such as the calorific value, temperature and expected consumption, of the relevant entry-exit system and the capacities in adjacent networks. Transmission system operators shall apply a dynamic approach with regard to the recalculation of the technical or additional capacity of the entry-exit system.
3. The oversubscription and buy-back scheme shall be based on an incentive regime reflecting the risks of transmission system operators in offering additional capacity. The scheme shall be structured in such a way that revenues from selling additional capacity and costs arising from the buy-back scheme or measures pursuant to paragraph 6 are shared between the transmission system operators and the network users. National regulatory authorities shall decide on the distribution of revenues and costs between the transmission system operator and the network user.
4. For the purpose of determining transmission system operators' revenues, technical capacity, in particular surrendered capacity as well as, where relevant, capacity arising from the application of firm day-ahead use-it-or-lose-it and long term use-it-or-lose-it mechanisms, shall be considered to be allocated prior to any additional capacity.
5. In determining the additional capacity, the transmission system operator shall take into account statistical scenarios for the likely amount of physically unused capacity at any given time at interconnection points. It shall also take into account a risk profile for offering additional capacity which does not lead to excessive buy-back obligation. The oversubscription and buy-back scheme shall also estimate the likelihood and the costs of buying back capacity on the market and reflect this in the amount of additional capacity to be made available.
6. Where necessary to maintain system integrity, transmission system operators shall apply a market-based buy-back procedure in which network users can offer capacity. Network users shall be informed about the applicable buy-back procedure. The application of a buy-back procedure is without prejudice to the applicable emergency measures.
7. Transmission system operators shall, before applying a buy-back procedure, verify whether alternative technical and commercial measures can maintain system integrity in a more cost-efficient manner.

8. When proposing the oversubscription and buy-back scheme the transmission system operator shall provide all relevant data, estimates, and models to the national regulatory authority in order for the latter to assess the scheme. The transmission system operator shall regularly report to the national regulatory authority on the functioning of the scheme and, upon request of the national regulatory authority, provide all relevant data. The national regulatory authority may request the transmission system operator to revise the scheme.

2.2.3. Firm day-ahead use-it-or-lose-it mechanism

1. National regulatory authorities shall require transmission system operators to apply at least the rules laid down in paragraph 3 per network user at interconnection points with respect to altering the initial nomination if, on the basis of the yearly monitoring report of the Agency in accordance with point 2.2.1(2), it is shown that at interconnection points demand exceeded offer, at the reserve price when auctions are used, in the course of capacity allocation procedures in the year covered by the monitoring report for products for use in either that year or in one of the subsequent two years,
 - (a) for at least three firm capacity products with a duration of one month or
 - (b) for at least two firm capacity products with a duration of one quarter or
 - (c) for at least one firm capacity product with a duration of one year or more or
 - (d) where no firm capacity product with a duration of one month or more has been offered.
2. If, on the basis of the yearly monitoring report, it is shown that a situation as defined in paragraph 1 is unlikely to reoccur in the following three years, for example as a result of capacity becoming available from physical expansion of the network or termination of long-term contracts, the relevant national regulatory authorities may decide to terminate the firm day-ahead use-it-or-lose-it mechanism.
3. Firm renomination is permitted up to 90 % and down to 10 % of the contracted capacity by the network user at the interconnection point. However, if the nomination exceeds 80 % of the contracted capacity, half of the non-nominated volume may be renominated upwards. If the nomination does not exceed 20 % of the contracted capacity, half of the nominated volume may be renominated downwards. The application of this paragraph is without prejudice to the applicable emergency measures.
4. The original holder of the contracted capacity may renominate the restricted part of its contracted firm capacity on an interruptible basis.
5. Paragraph 3 shall not apply to network users — persons or undertakings and the undertakings they control pursuant to Article 3 of Regulation (EC) No 139/2004 — holding less than 10 % of the average technical capacity in the preceding year at the interconnection point.
6. On interconnection points where a firm day-ahead use-it-or-lose-it mechanism in accordance with paragraph 3 is applied, an evaluation of the relationship with the oversubscription and buy-back scheme pursuant to point 2.2.2 shall be carried out by the national regulatory authority, which may result in a decision by the national regulatory authority not to apply the provisions of point 2.2.2 at those interconnection points. Such a decision shall be notified, without delay, to the Agency and the Commission.
7. A national regulatory authority may decide to implement a firm day-ahead use-it-or-lose-it mechanism pursuant to paragraph 3 on an interconnection point. Before adopting its decision, the national regulatory authority shall consult with the national regulatory authorities of adjacent Member States. In adopting its decision the national regulatory authority shall take account of the adjacent national regulatory authorities' opinions.

2.2.4. Surrender of contracted capacity

Transmission system operators shall accept any surrender of firm capacity which is contracted by the network user at an interconnection point, with the exception of capacity products with a duration of a day and shorter. The network user shall retain its rights and obligations under the capacity contract until the capacity is reallocated by the transmission system operator and to the extent the capacity is not reallocated by the transmission system operator. Surrendered capacity shall be considered to be reallocated only after all the available capacity has been allocated. The transmission system operator shall notify the network user without delay of any reallocation of its surrendered capacity. Specific terms and conditions for surrendering capacity, in particular for cases where several network users surrender their capacity, shall be approved by the national regulatory authority.

2.2.5. Long-term use-it-or-lose-it mechanism

1. National regulatory authorities shall require transmission system operators to partially or fully withdraw systematically underutilised contracted capacity on an interconnection point by a network user where that user has not sold or offered under reasonable conditions its unused capacity and where other network users request firm capacity. Contracted capacity is considered to be systematically underutilised in particular if:
 - (a) the network user uses less than on average 80 % of its contracted capacity both from 1 April until 30 September and from 1 October until 31 March with an effective contract duration of more than one year for which no proper justification could be provided; or
 - (b) the network user systematically nominates close to 100 % of its contracted capacity and renominates downwards with a view to circumventing the rules laid down in point 2.2.3(3).
 2. The application of a firm day-ahead use-it-or-lose-it mechanism shall not be regarded as justification to prevent the application of paragraph 1.
 3. Withdrawal shall result in the network user losing its contracted capacity partially or completely for a given period or for the remaining effective contractual term. The network user shall retain its rights and obligations under the capacity contract until the capacity is reallocated by the transmission system operator and to the extent the capacity is not reallocated by the transmission system operator.
 4. Transmission system operators shall regularly provide national regulatory authorities with all the data necessary to monitor the extent to which contracted capacities with effective contract duration of more than one year or recurring quarters covering at least two years are used;.
2. point 3.1.1(1) is amended as follows:
- (a) point (e) is replaced by the following:

‘(e) in a downloadable format that has been agreed between transmission system operators and the national regulatory authorities — on the basis of an opinion on a harmonised format that shall be provided by the Agency — and that allows for quantitative analyses;’
 - (b) the following point (h) is added:

‘(h) all data shall be made available as of 1 October 2013 on one Union-wide central platform, established by ENTSOG on a cost-efficient basis;’
3. in point 3.3(1) the following points (h), (i), (j), (k) and (l) are added:
- (h) occurrence of unsuccessful, legally valid requests for firm capacity products with a duration of one month or longer including the number and volume of the unsuccessful requests; and
 - (i) in the case of auctions, where and when firm capacity products with a duration of one month or longer have cleared at prices higher than the reserve price;
 - (j) where and when no firm capacity product with a duration of one month or longer has been offered in the regular allocation process;
 - (k) total capacity made available through the application of the congestion-management procedures laid down in points 2.2.2, 2.2.3, 2.2.4 and 2.2.5 per applied congestion-management procedure;
 - (l) points (h) to (k) shall apply from 1 October 2013.’
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